LOW CHANG HIAN

v.

KELAB GOLF DIRAJA SELANGOR

HIGH COURT MALAYA, KUALA LUMPUR
DATO' K.C. VOHRAH J
[ORIGINATING SUMMONS NO. S1-24-86-95]
1 AUGUST 1995

CIVIL PROCEDURE: *Affidavits - Originating summons - Time for filing affidavit in reply - Whether O. 32 r. 13(2)(a) refers to only summons in chambers - Whether applicable to originating summons - O. 28 procedure - Rules of the High Court 1980, O. 28 & O. 32.*

The plaintiff's originating summons and affidavit in support were served on the defendant on 20 February 1995. The defendant's affidavit afffirmed 16 May 1995 was filed and served on the plaintiff's solicitors on 16 May 1995. The plaintiff raised a preliminary objection and argued that the defendant's affidavit in reply ought to be disregarded as the said affidavit in reply was not served in compliance with O. 32 r. 13(2)(b) of the Rules of the High Court 1980 (the Rules). He argued that the said affidavit in reply was not served on the plaintiff within 14 days from the date the plaintiff's affidavit in support was served on the defendant.

The issue was whether the O. 32 r. 13(2)(b) procedure applied to originating summonses in the manner as applied to summons in chambers.

Held:

[1] The word "application" in O. 32 r. 13(2)(a) must be used in the context of O. 32 where r. 1 sets out its nature as referring to summons in chambers as in Form 62. Form 62 is not the form for any type of originating summons in the Rules.

[2] Order 32 r. 8 and rr. 17-22 make specific mention of applications under specific legislations to be by way of originating summons, clearly showing that the drafters of the Rules were well aware that O. 32 is an order where an application otherwise than those specified in rr. 8 and 17-22 has to be by way of summons in chambers.

[3] Order 28 r. 1 specifically provides that the provisions of the order apply to all originating summonses subject to any special provisions relating to originating summonses of any particular class made by those rules or by or under any written law and, that subject as aforesaid, O. 32 r. 5 shall apply in relation to originating summonses as it applies in relation to other summonses. Such a provision makes it clear that the other provisions of O. 32 including r. 13(2) do not apply to originating summonses.

[4] Order 28 r. 3(3) and (4) are specific provisions relating to use of affidavits in originating summons proceedings by the plaintiff. Order 28 r. 3(3) clearly conflict with O. 32 r. 13(2) if O. 32 r. 13(2) is to apply to affidavits for originating summonses. Order 32 r. 13(2) is a general provision applying to affidavits in summons in chambers proceedings.

[Preliminary objection dismissed].

Case referred to:
PB Securities Sdn. Bhd. v. Abdul Rashid bin Mohamed [1994] 3 CLJ 209, [1994] 3 MLJ 168 ***(foll)***

Legislation referred to:
Mental Disorder Ordinance 1952
Rules of the High Court 1980, O. 7 r. 2, O. 14, O. 27 r. 7, O. 28 r. 1, O. 32 rr. 1, 5, 8, 13(2)(b), 17-22, O. 89, r. 2
Rules of the Supreme Court 1965 (UK), O. 32 r. 9
Settled Estates Ordinance (SS Cap 52)

For the plaintiff - Azlan Khamis; M/s. Ghazali Ariff & Partners
For the defendant - Christopher Leong; M/s. Chooi & Co.

JUDGMENT

K.C. Vohrah J:

In this case the plaintiff raised a preliminary objection and argued that the defendant's affidavit-in-reply ought to be disregarded as the said affidavit was not served in compliance with O. 32 r. 13(2)(b) of the Rules of the High Court 1980 ('RHC'). The argument was that the said affidavit in reply was not served on the plaintiff within 14 days from the date the plaintiff's affidavit in support was served on the defendant as required.

The originating summons and the affidavit in support were served on the defendant on 20 February 1995. The defendant's affidavit-in-reply affirmed on 16 May 1995 was filed and served on the plaintiff's solicitors on 16 May 1995.

Order 32 r. 13(2) of the RHC which was introduced with effect from 1 August 1993 states as follows:

> Save as otherwise provided in these rules -
>
> (a) an affidavit intended to be used in support of an application must be filed and served on the other party within 14 days from the date of the filing of the application; and
>
> (b) a party wishing to reply an affidavit served on him must file his affidavit and serve it on the other party within 14 days from the date on which the affidavit he intends to reply was served on him.

It will be noticed that in r. 13(2)(a) the nature of the affidavit has reference to it being used 'in support of an application'. The word 'application' must be used in the context of O. 32 where r. 1 sets out its nature, *viz*, 'Except as provided by O. 25, r. 7, every application in chambers must be made by summons in Form 62'. Form 62 is clearly the form for summon in chambers and certainly not the form for the originating summons where appearance is required (O. 7 r. 2; Form 6) nor the originating summons where appearance is not required (O. 7 r. 2; Form 7) nor the *ex parte* originating summons (O. 7 r. 2); Form 8) nor the originating summons for possession (O. 89 r. 2; Form 8A). It has to be noted, however, rr. 8 and 17-22 of O. 32 of the RHC state that applications under specific legislations, the Mental Disorder Ordinance 1952 and the Settled Estates Ordinance (SS Cap 52), are to be by way of originating summons. These provisions are an adaptation of English statutory provisions, i.e. O. 32 r. 9 of the English Rules of the Supreme Court 1965.

The point to note is that rr. 8 and 17-22 of O. 32 make specific mention of application by way of originating summons, clearly showing that the drafters of the rules were well aware that O. 32 is an Order where an application otherwise than those specified in rr. 8 and 17-22 has to be by way of summons in chambers.

As was pointed out earlier, O. 7, O. 28 and O. 89 are connected with originating summonses. Order 7 deals with the forms of originating summonses, the contents of the summonses, the issue and duration and renewal of summonses. Order 89, introduced in 1984, deals specifically with summary proceedings for possession of land which have to be brought by originating summonses. Order 28 deals with originating summons procedure.

To be noted is that O. 28 r. 1 specifically provides that the provisions of the Order apply to all originating summonses subject, in the case of originating summonses of any particular class, to any special provisions relating to originating summonses of that class made by those rules or by or under any written law and, that subject as aforesaid, O. 32 r. 5, shall apply in relation to originating summonses as it applies in relation to other summonses. I think such a provision does make it quite clear that the other provisions of O. 32 including r. 13(2) of the Order do not apply to originating summonses.

Order 28 does have provisions relating to affidavit and so they need to be looked into. Rules 3(3) and (4) of O. 28 are specific provisions relating to the use of affidavits in originating summons proceedings by the plaintiff.

They read:

> (3) Where the plaintiff intends to adduce evidence in support of an originating summons at the first hearing thereof he must do so by affidavit and, not less than 4 clear days before the hearing, serve a copy thereof on every

defendant who has entered an appearance or, if the summons is one to which appearance is not required, on every defendant who has been served with the summons.

(4) Not less than 4 clear days before the day fixed for the hearing on an *ex parte* originating summons the applicant must file an affidavit in support of the summons.

Order 28 r. 3(3) above quoted clearly conflicts with O. 32 r. 13(2) (reproduced earlier) if the view is that O. 32 r. 13(2) is to apply to affidavits for originating summonses. That view obviously cannot prevail. Order 32 r. 13(2) is a general provision applying to affidavits used in summons in chambers only.

Richard Talalla J has succintly summarized the principles and the case law to be used in construing rules which appear to conflict in *PB Securities Sdn. Bhd. v. Abdul Rashid bin Mohamed* [1994] 3 MLJ 168 at p. 171B-D:

> As to the principles to be applied in construing the Rules, in *Proprietors of Strata Plan No 159 v. Parramatta City Council* [1985] 55 LGRA 363 at p. 364, per Kirby P (NSW CA) it was stated that so far as is consistent with the language used, Courts should endeavour to reconcile legislation, so that the provisions of several Acts can operate harmoniously with each other. In *Barker v. Edger* [1898] AC 748 at p. 754, per Lord Hobhouse (PC) it was said that when the legislature has given its attention to a separate subject and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject matter and its own terms. The same canon of construction has also been applied to the English Rules of the Supreme Court, see *Hasker v. Wood* [1885] 54 LJQB 419 and *Bostock v. Ramsey Urban District Council* [1900] 1 QB 357; [1900] 2 QB 616 and the County Courts, see *Reeve v. Gibson* [1891] 1 QB 652.

In the case of *PB Securities Sdn. Bhd.,* Richard Talalla J held in respect of the apparent conflict between r. 13(2) of O. 32, the same rule under scrutiny here, and O. 14, that O. 14 and r. 13 of O. 32 are not incompatible and can operate harmoniously with each other, as O. 32 relates to applications and proceedings in chambers and in the absence of anything else, the order is to apply generally as r. 13(2)(b) is expressly stated to apply save as otherwise provided in the rules.

Although rr. 3(3) and 3(4) of O. 28 relate to affidavits used in originating summonses, they refer to the affidavit of the plaintiffs. No mention is made as to the affidavit-in-reply of the defendant.

Admittedly there is a lacuna in the law but that is not to say that, in that event, r. 13 (2) of O. 32 has to be resorted to.

I rule that the defendant's affidavit may be used in this case.

Order accordingly.

Reported by L. Nagarajan